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Supreme Court
No. 86188-9

Court of Appeals
No. 63919-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

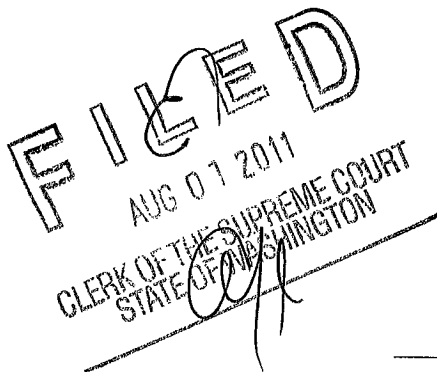
MARY FRANKLIN,

Respondent,

v.

JACKIE JOHNSTON

Petitioner.



CLERK

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STATE OF WASHINGTON
SUPREME COURT

JACKIE JOHNSTON'S REPLY TO RESPONDENT'S ANSWER
TO PETITION FOR REVIEW BY
THE WASHINGTON SUPREME COURT

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ORIGINAL

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I. INTRODUCTION

The trial court held Ms. Johnston's former intimate partner, Mary Franklin, an unintended parent, was Ms. Johnston's child's de facto parent despite Ms. Franklin having acted as a paid foster parent for most of the child's life. Ms. Franklin appealed certain financial obligations, including child support and attorney fees; and certain parenting issues, including decision making. Ms. Johnston cross-appealed the trial court's conclusion Ms. Franklin could be the child's de facto parent. The intermediate appellate court, Division One, affirmed the trial court's decision in all respects in a part published opinion. Ms. Johnston timely petitioned this Court to review the intermediate appellate court's opinion's (Opinion) published portion citing conflicts with current law and public importance. In her answer to Ms. Johnston's petition, Ms. Franklin petitions this Court to review the Opinion's unpublished portions regarding financial relief and parenting issues. Because the Opinion's unpublished portions deal with well-settled laws that are not in conflict and do not deal with matters strongly affecting the public interest, Ms. Franklin's request for this Court to review the Opinion's unpublished portions should be denied.

II. ARGUMENT

A. This Court should Decline Review of the Attorney Fee Issue.

Respondent, Mary Franklin, argues in her Answer to Ms. Johnston's Petition for Review that the Uniform Parentage Act (UPA), chapter 26.26 RCW, cannot authorize a claim to attorney's fees here.¹ However, the Court of

¹ Answer at 5.

Appeals *agreed* with Ms. Franklin “that the UPA does not provide a basis for an award of attorney fees in this case,”² and Ms. Johnston’s Petition did not raise the issue of a fee award under the UPA. There is no controversy relative to a fee award under the UPA to review.

Ms. Franklin also argues that RCW 26.10.080 cannot authorize an award of fees, but in fact it can. This statute states, in pertinent part,

The court from time to time, after considering the financial resources of all parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.³

The Court of Appeals affirmed the trial court’s award of fees in favor of Johnston under RCW 26.10.080 because Franklin brought a nonparental custody action in addition to her de facto parentage claim, did not prevail on the nonparental custody claim, and the trial court is statutorily authorized to award attorney fees in such a circumstance.⁴

In support of her argument, Ms. Franklin cites RCW 8.84.010.8 and RCW 8.84.030.9, which do not exist. She perhaps intended to cite RCW 4.84.010 and RCW 4.84.030, which do deal with recovery of costs. However, RCW 4.84.010 applies to actions brought under contracts, not to family law cases, and is therefore inapplicable.⁵

² Opinion at 25.

³ RCW 26.10.080.

⁴ RCW 26.10.080; Opinion at 26.

⁵ RCW 4.84.010.

Ms. Franklin also argues that the attorney fees should have been separated “to their respective case.”⁶ Possibly she means *segregated*. Ms. Franklin first raised the fee segregation issue on appeal in her opening brief before the intermediate appellate court.⁷ In her brief she also failed to include any citation to the record in her supporting argument showing that she objected at the trial court level. The record before the appellate court showed Ms. Franklin made no argument that Ms. Johnston was not entitled to attorney fees at trial; rather, she only requested additional time to pay the fees awarded.⁸ As a result the intermediate appellate court correctly stated in its Opinion that “Franklin’s contention that she raised such an objection below is not supported by the record.”⁹

Ms. Franklin also argues she was denied procedural due process because she says she did not have sufficient notice that attorney fees were at issue. However, the request was made during the proceeding, and Ms. Franklin made no objection.¹⁰ Because the procedural due process argument was not made to the trial court, the appellate court and this Court are not obligated to consider the issue; rather, it is discretionary.¹¹ This Court should not exercise its discretion and review this procedural due process argument because it has no merit. Interim attorney fees were requested months before trial began so Ms.

⁶ Answer at 5.

⁷ Appellant’s Br. at 33.

⁸ Opinion at 27.

⁹ Opinion at 26.

¹⁰ Opinion at 27.

¹¹ RAP 2.5(a).

Franklin knew about the issue, and she also had an adequate opportunity to respond because she responded to the pre-trial attorney fee issue.¹²

Finally, Ms. Franklin did not demonstrate any pressing need based on conflict or important public policy that needs to be addressed. Because the law in this area is well settled and neither the trial court's decision nor the Opinion's unpublished portions conflict with this law and because there is no important public policy that needs to be addressed, Ms. Franklin's request for the attorney fee issue in a third party custody case should not be accepted for review.¹³

B. This Court should Decline Review of the Child Support Issue.

Ms. Franklin's only argument regarding the child support award is that "neither party in brief to trial" raised the issue.¹⁴ Although Ms. Franklin's argument is not clear, she apparently sees this as a procedural due process violation. However, as the Opinion points out, Franklin herself sought entry of a child support order in her petition for establishment of de facto parentage. "Where an individual seeks rights as a de facto parent, that individual must also accept the responsibilities that accompany parent-child relationships. Such responsibilities include child support."¹⁵ Where Franklin herself brought the action seeking parental rights as a de facto parent, and she requested a child support order be entered, she cannot now say she did not have notice or opportunity to be heard on the child support issue at trial. Franklin has shown no procedural due process violation. There is, therefore, no constitutional issue

¹² CP 78-79; 107 – 111; 112- 116; and 117-133.

¹³ See RAP 13.4(b).

¹⁴ Answer at 8.

¹⁵ Opinion at 23.

to review. Similar to the attorney fee issue, Ms. Franklin has also not shown an appropriate conflict in existing case law or substantial public interest justifying review.¹⁶ This Court should, therefore, decline to review the child support award.

C. Ms. Johnston has no Entitlement to Counsel in Cases Involving Parentage or Third-Party Custody.

Ms. Franklin argues that Ms. Johnston has no constitutional or statutory entitlement to counsel in cases involving parentage or third party custody. Ms. Johnston agrees. Despite this agreement, this issue was neither presented to the trial court nor the intermediate appellate court and is raised for the first time in an answer to petition for review. Ms. Johnston did not have state-appointed counsel in the family law matter or in this appeal and, therefore, this case does not present facts to review Ms. Franklin's argument.

D. This Court should Decline Review of the Decision-Making Issue.

Ms. Franklin argues in her Answer that because the trial court entered a parenting plan giving Ms. Johnston sole decision-making authority in the event the parties cannot successfully make a joint decision, she was denied parity as a de facto parent. It is true this Court has held that "in Washington, a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise."¹⁷ This means courts are entitled to use the lower best interests of the child standard when making decisions about parenting rights using Washington's common law de facto parentage doctrine. To be sure, this

¹⁶ See RAP 13.4(b).

¹⁷ *In re Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005).

Court said in the next breath, a de facto parent “is *not* entitled to any parental privileges, as a matter of right, but *only* as is determined to be in the best interests of the child at the center of any such dispute.”¹⁸ Recognition of de facto parent status merely “authorizes a court to *consider* an award of parental rights and responsibilities... based on its determination of the best interest of the child.”¹⁹

Ms. Franklin’s argument seems to be that because she believes she has been the better parent, she should have the decision making authority. She cites no case law or specific statute to support this position, making only a broad reference to both chapters 26.09 RCW and 26.26 RCW in their entirety. Neither statutory section apply to de facto parent situations. RCW ch 26.09 applies to marital and registered domestic partner dissolutions. These parties were not married and were not registered domestic partners so this chapter does not apply. RCW ch. 26.26 applies to parentage actions, which the Opinion found does not apply to this case.²⁰ This leaves the common law as the only avenue for Ms. Franklin to acquire any parental rights. As the intermediate appellate court correctly stated in its Opinion, it was within the trial court’s broad discretion to grant decision making authority to Ms. Johnston based on its determination of the best interests of the child. The trial court and the intermediate appellate court, therefore, did not ignore *L.B.*; rather, they followed it. As such, there is no conflict. Not only is there no conflict, but there

¹⁸ *L.B.*, 155 Wn.2d at 708-09. (Emphasis added.)

¹⁹ *L.B.*, 155 Wn. 2d at 708. (Emphasis added.)

²⁰ Opinion, Pg. 25, citing *L.B.* 155 Wn.2d at 705-07.

is no constitutional issue or substantial public interest justifying review. This Court should not, therefore, review the decision making issue.

II. CONCLUSION

Ms. Franklin's Answer raised three issues not in Ms. Johnston's Petition for Review: 1) the attorney fee award; 2) the child support award; and 3) parental decision making authority. When these issues are analyzed with the RAP 13.4(b) criteria, it is clear there is no constitutional issue that was improperly reviewed by the appellate court; there is no appropriate conflict between the unpublished portions of the Opinion in these well-settled areas of the law; and there is no substantial public interest being affected that justifies this Court exercising its discretion to review the issues raised by Ms. Franklin in her answer to Ms. Johnston's petition for review.

RESPECTFULLY SUBMITTED July 29, 2011.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of JACKIE JOHNSTON'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT to the following individuals via U.S. Mail:

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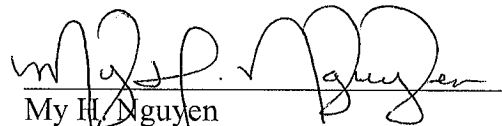
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